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AUTHOR Burtchaell, James Tunstead
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ABSTRACT

The most appropriate form of governance for higher education in the U.S. is by boards of trustees. The strong hand of governing boards has been felt and has caused some alarm. Faculty and students in search of academic power, who had previously thought that it was to be had at the price of endless ennui in campus committees, are claiming seats on the governing boards. The need for vigorous governing bodies resides within both public and private institutions alike. The board of trustees must also be independent of the academics as it is of the politicians. Governance must be exercised both within and without. Externally, the college or university accounts for itself to a group of lay trustees who hold it responsible for society's needs. It is also responsible to a group of peer institutions who grant it accreditation. Internal governance involves administration and faculty and generally in major matters requires ratification but not reconsideration by the trustees. Boards of trustees must be saved from becoming either instrumentalities of the State or appellate gatherings of the academy. (Author/PG)

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A Word in Favor of Trusting Trustees

James Tunstead Burtchaell, C.S.C.

I would plead that the most appropriate form of governance for higher education in our own country is by boards of trustees. We simply must learn that the public interest has other representatives than those elected in the political process.

Two centuries ago, a great rebellion was ignited by a shot heard round the world. Three years ago, shots fired at Kent State, quite the contrary of those fired in Lexington and Concord, extinguished an insurrection, one that had begun about six years earlier in Berkeley. Three summers ago, however, who could have foreseen that it was all ending, that a wave of student rest would soon be washing over the country?

In those days when tempers were still running high Robert Nisbet, an acidulous observer of the quarrelsome years, was blaming the campus troubles of the sixties on the dissipation of academic authority through democratic participation in decision-making by students and faculty. Boards of trustees, he predicted in that summer of 1970, would soon be taking power into their own hands to set their houses in order, and this intervention would be conservative.

> One may regret this, as I do, for the history of trustee intervention in academic affairs is surely a checkered one. But the lay board is sovereign in American colleges and universities, and the pressure of public opinion, of government officials, and, most assuredly, of alumni groups will make such intervention certain.
>
> Such trustee intervention will touch areas heretofore sacred to faculties: Areas of appointment and promotion, of academic admissions, of academic tenure, and, most especially, curriculum. . .

James Tunstead Burtchaell, C.S.C., is Provost of the University of Notre Dame. He presented this paper at the annual meeting of the National Association of College and University Business Officers in Chicago, July 9, 1973.

> None of these is an area in which trustee judgment is ordinarily very good. Trustees lack the qualifications of experience and of insight that can come only from experience. But trustee intervention will nevertheless take place in rising volume.[1]

The strong hand of governing boards has been felt, and has caused some alarm. Faculty and students in search of academic power, who had previosuly thought that it was to be had at the price of endless ennui in campus committees, are presently persuaded that the seat of power is really off the campus, and are now claiming seats on the governing boards.

They do not see what Nisbet did not foresee: that an even greater imposition of power from even further away would reach in to claim ultimate control: the government. Clark Kerr described it well last fall:

> The greatest current change in governance is not the rise of student or faculty power but the rise of public power; the governance *of* higher education is less and less *by* and *for* higher education. Just as state budget experts, legislative committees, governors, and even the courts become more involved with the campus, so also will the campus, through its president, student lobbies, and faculty unions, for example, become more involved with public authority. The ivory tower of yore is becoming a regulated public utility. . .
>
> Public control is intensifying. . . . As higher education has become more central to society, society has become more concerned with it. Full autonomy, to the extent that it ever existed, is dead, although independent action in "reserved" areas is still possible and highly essential.[2]

Kerr's comments were endorsed and extended later by the Carnegie Commission on Higher Education, which he serves as chairman:

> It is customary to speak of campus "autonomy," but there is no such thing in any full sense of the word. Full autonomy is always limited by the general law and often also by the charter of the institution. . . . Colleges and universities avidly want more public financial support and thus must accept some dependence.[3]

While accepting the Kerr-Carnegie finding of fact that government is the new force in university governance, threatening to assume preeminent control, I should like to present a judgment upon this state of affairs which is considerably less acquiescent. Indeed, I would urge academics disposed to resent the new activism by trustees whom they consider as meddlers, neither to thwart them nor to force themselves into their midst. I ask academics to consider that these trustees are their surest protection against the heavy and improper intrusions of the State. Those who truly desire autonomy for higher education – and I am

[1] "The Restoration of Academic Authority," *Wall Street Journal*, August 19, 1970.

[2] "Administration in an Era of Change and Conflict," *Educational Record* 54, 1 (Winter 1973), p. 42.

[3] *Governance of Higher Education* (McGraw-Hill, 1973), p. 17.

one of those – should strive to strengthen rather than to enfeeble their governing boards, as I shall try to explain.

The need for vigorous governing bodies lodges with both public and private institutions alike. Indeed, our nomenclature of "public" and "private" is awkward. Both sorts of schools are trusts for the common good, and both offer education to the people at large.[4] Thus in this sense all colleges and universities are public. But neither sort of institution, I submit, should function as an agency of the State; neither should be run as a department of the government. In this respect they share a certain need for privacy from political control.

There is a certain folk wisdom that would deny independence to both "public" and "private" universities and colleges. Both need some sort of funding from the government, and it is only natural to expect that if the government provides the funds, it will claim the right to have a say-so in how they are spent. Beyond even this inevitability of paying the piper and calling the tune lies a political dogma that the State must be the supervisor of any agency that serves the public good, even when the agency does not depend upon the governmental treasury for its support. Hence, Clark Kerr's astute comparison to public utilities. The theory behind this philosophy is that only the State is subject to the political judgment and control of the people, and hence it alone can be trusted to provide rightly for the people's needs.

But there exist very ancient and quite firm denials of this wisdom and this dogma. The State, despite the power of the public purse and the public ballot, does not and by right should not enjoy a monopoly on the protection of the public good. The Constitution of the United States of America takes the view that there are some enterprises quite essential to the common weal which should on no account lie under the command of the government. The press, and public speech, and religion are given privileged immunities from the State, not because they are private goods, but because they cannot survive State control. Had the idea then crossed anyone's mind that the federal or state governments would eventually become sponsors of education, it is quite possible that this endeavor might also have aroused a similar constitutional concern. Note that speech, religion, and the press have this in common with education: they all deal in ideas. It is the State's business to wield coercive power to assure the observance of the law and the fostering of the common welfare. That one, unique area of the common welfare where the politically applied power of coercion does little good and much harm is the area which withers

[4]Ironically, the most private colleges in our country are conducted by the federal government: the military academies, which are not open to the public.

unless allowed its freedom: the area of the intellect, of research, of the mind's adventure. Thus, while the State may be the people's excellent, and perhaps best, servant in supervising justice, it is a poor protector of the truth, and our founding fathers relieved it of this responsibility.

Deep within our national tradition, then, there lies a resolute conviction that the minds of the citizens are to be sanctuaries free from intrusion by agents of the body politic. Yet the application of this belief to the sphere of education is troublesome. When the Constitution was written, few besides Thomas Jefferson foresaw public schools. As things now stand, the relatively straightforward strategy of non-establishment which the Constitution adopted to protect religion from the State (and vice versa) is no longer available in the matter of education. What other strategy might be available?

Other constitutional traditions offer clues. In Great Britain, for instance, the government sponsors radio and television broadcasting. From the time of its establishment, the BBC was set up as a public corporation under its own Board of Governors, to act as trustees for the national interest, for the reason that "such an authority would enjoy a freedom and flexibility which a Minister of State himself could scarcely exercise."[5] Although the government retains ultimate control, the creation of an independent board supplies an intervening break in a direct linkage of authority, and keeps the BBC (it is hoped) from being subject to the direction and guidance of political leaders.

Similarly, I would plead that the most appropriate form of governance for higher education in our own country is by boards of trustees. To the extent that State funds support any institution, the government may claim a right to nominate some of the trustees, but it would probably be better were this claim not pressed. We simply must learn that the public interest has other representatives than those elected in the political process. In any case, no government official should act as trustee for an institution within his jurisdiction.[6]

This principle applies with equal propriety to "public" and "private" colleges and universities. The classic statement on behalf of institutional

[5]Cited from the official report which led to the creation of the BBC. See Burton Paulu, *British Broadcasting in Transition* (Minneapolis: University of Minnesota Press, 1961), p. 14.

[6]"To perform its functions well, the board needs to be independent, free of conflict of interest, competent, devoted, and sensitive to the interests of the several groups involved in the life of the campus. Thus we oppose politically elected officials serving ex officio on boards of public institutions because they both reduce the independence of the campus from state control and introduce a conflict of interest due to their necessary political partisanship; and, since they later act on budgets and other major policies, they have a major opportunity for influence and a major measure of control in any event." Carnegie Commission on Higher Education, *op. cit.*, p. 33.

autonomy in private colleges is Daniel Webster's speech before the Supreme Court of the United States in the Dartmouth College case. Unfortunately, he rested his case on the argument that the college had been chartered as a private charity, and its trustees were inheritors from the founder of vested property rights which the State could not alienate.

> Hence the doctrine, that all eleemosynary corporations are private bodies. They are founded by private persons, and on private property. The public cannot be charitable in these institutions. It is not the money of the public, but of private persons, which is dispensed. It may be public, that is general, in its uses and advantages; and the state may very laudably add contributions of its own to the funds; but it is still private in the tenure of the property, and in the right of administering the funds.[7]

Webster's argument, that private funding justifies private control, is no longer very applicable to "private" colleges, and would never have referred to "public" ones. The proper argument on behalf of institutional autonomy from State control does not derive, however, from the *source of operating funds;* on this ground virtually all schools today would become instrumentalities of the government. The ground of autonomy, shared by all schools, is the nature of their *common enterprise: intellectual inquiry*, which experience tells us is better not confided to the control of the politicians. "Public" and "private" colleges and universities alike must be accountable beyond themselves to all who establish a legitimate interest or stake in them. But it must be recognized that *some* agencies which serve the common good should answer for their service to representatives of the people other than partisan, elected officials of government. Whenever it can be demonstrated that it is inexpedient for some enterprise to be subject to the government, the State is perfectly justified in supplying its financial needs, while absolving itself of direct supervision over their use. This has been done, to cite but a few examples, for the Tennessee Valley Authority, the Vienna State Opera, and the New York Port Authority. The government simply admitted that it was capable enough of paying the piper, but rather too tone-deaf to call the tune. Political philosopher Jacques Maritain asserted that a token of political maturity

> would consist in having the State start and support . . . large scale undertakings planned and managed *not* by the State and not from the center of the country's political administration, but on the spot, by private enterprises co-ordinated with one another and by the various communities of the very people concerned, under the leadership of independent responsible appointees.[8]

I am arguing, then,

[7] *The Speeches of Daniel Webster*, ed. B. F. Tefft (New York: A. L. Burt Co. [n.d.]), pp. 30-31.

[8] *Man and the State* (Chicago: The University of Chicago Press [Phoenix Books], 1956), p. 22.

that institutions of higher education do indeed exercise a public service;

that they are publicly accountable for this service;

that the government is a demonstrably unreliable seat of governance for this service, because education deals in matters of the mind and spirit;

that independent boards of trustees should exercise this governance for the people;

and that accountability to the people and control by them should never simply be equated with accountability to the government and control by it.

The complementary side of this argument, and the other point I wish to address, is that a board of trustees must also be independent of the academics as it is of the politicians. It must be as distinct from the campus as from the capitol.

It is often said that the venerable principle of "consent of the governed" ought to be applied to colleges and universities. The school exists for the scholars who teach and study there, and they must have the final say in its governance. But this venerable principle, improperly transferred from the political order to the educational enterprise, makes poor theory and poor practice.

To begin with, it derives from a mistaken understanding of the English system. The ancient universities and their colleges in Britain are invoked as models of entirely self-contained governance. The fellows govern their own colleges, and the faculty govern their universities. What one ignores is that all of these institutions have a higher outside authority, called the Visitor, with practically plenipotentiary discretion to see that the founding trust is observed. The fellows and faculty do indeed provide for the ordinary management of the colleges and universities. In this sense they are said to govern, but this is the same sense in which administrators and faculty (and sometimes students) do govern American campuses. In the British model, the Visitor does intervene but rarely. The Visitor of the universities is the Crown (read: government), and thus there is much closer State control than in our country when the State wishes to wield it. The fact that virtually the only major academic reforms at Oxford and Cambridge in this century have been the work, not of the faculties but of the Crown Commissions visited upon them from time to time, may also argue that internal governance performs better when it has regular external oversight.

On the side of theory, it must be admitted that every educational institution is a public trust, and as such owes an account of its fulfillment of that trust to representatives from without. It is important to distinguish a voluntary undertaking within society from the society itself. The aim of organizations within society that pursue social

objectives, claims Peter Drucker, is not the fulfillment of their members (in this they differ from the State).

> At first sight this may seem not to apply to the university. It proudly calls itself a "community of scholars" and claims that it is an end in itself. But this is, of course, why today's students rebel against the traditional university. They demand that the university serve an outside need, namely, the students' learning need. In an "educated society," in which knowledge is becoming the central resource, the traditional self-serving "community of scholars" is no longer tenable, if indeed it ever existed.[9]

The trustees of a university or college are admittedly not professionals in the academy. Their competency is assured not by possession of the skills of scholarship, but by sensitivity to the educational needs of the constituency the academy is bound to serve. The Carnegie Commission observes well of the board of trustees: "It should not run the college, but it should assure that it is well run."[10]

Governance, then, is exercised both within and without. Externally, the college or university accounts for itself to a group of lay trustees who hold it responsible for society's needs. It is also responsible to a group of peer institutions who grant it accreditation. Note that the role and requirements of governors and accreditors are different. Internal governance involves administration and faculty (and, as I observed, students) and generally in major matters requires ratification but not reconsideration by the trustees.

For this reason it is ill-advised for any campus constituency (faculty, students, or administrators below the presidency) to seek representation on their boards of trustees. These boards are not warranted to conduct the sort of deliberations which academics engage in. It is neither their task nor their competence. If the internal campus folk, seeing that all of their attempts to gain power over college affairs are subject in the end to reversal by the puissant intervention of the trustees, or if faculty or students, seeking trusteeship as a final advantage over administrators, try to gain representation on their boards, they are bringing even greater grief upon their heads. They will be inviting the boards to think themselves competent to reconsider every matter that has already been determined by the process of internal governance, and this reconsideration on the merits will be done by a body

[9] "Toward a Theory of Organizations," in The Age of Discontinuity (New York: Harper & Row, 1968, p. 207. He also goes on to say (pp. 210-211): "To satisfy their members is not and can never be the first task or the test of the pluralist organizations of our society. They must satisfy people outside, must achieve results outside. At best, they can integrate and harmonize the ends, values, and wants of their members with the demands of their mission. But the mission comes first. It is given. It is objective. It is impersonal. It is, at the same time, specific, limited, and aimed at only one of the many needs and wants of society, community, and individual. It is this dedication to one limited purpose of larger society that makes our modern organization effective."

[10] *Op. cit.*, p. 36.

in which they have much less influence than they do on the campus.[11]

Ironically, if faculty and students should succeed in making their way onto boards of trustees of their institutions, they will only succeed in disfranchizing themselves from the more appropriate and more effective power they have lately acquired in the internal councils of their schools. They would only be encouraging external boards to take under their advisement all manner of matters best left to the determination of internal governance, with external ratification.

Trusteeship in America occupies a difficult middle ground. On the one hand, it has been purposely isolated from government politics. On the other, distance has been created between it and the day-to-day interplay of campus interests. Boards of trustees, then, must be saved from becoming either instrumentalities of the State, or appellate gatherings of the academy. They need freedom from above and freedom from below. They will meddle the less they are meddled with. They are, after all, meant to be lay bodies who hold scholars to their high calling, and support and protect them in the performance of it.

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11 "We also oppose faculty members and students of an institution serving on the board of the same institution because of potential conflicts of interest, and also because it is difficult to assure that they really are 'representative' of the faculty or the student body – if 'representatives' are what is wanted (which we greatly doubt). Additionally, such membership would more likely draw board attention to day-to-day specifications." Carnegie Commission, *op. cit.*, p. 33.

It is also interesting to quote from the report of the Yale University Study Commission on Governance (Office of the Secretary, 1971): "Nothing is to be gained by converting the Corporation, even if it were possible, into a faculty or student board of trustees. Nor, it should be added, is there any persuasive case for adding minority representation of Yale's students or faculty to the Corporation. For the problem is not at all to find ways of representing students and faculty on the Corporation: the problem is to find Corporation members of rare capacities for the kinds of decisions that ought not to be made by faculty or students – for the overall, long-term trusteeship of Yale. The Corporation should be independent, not representative. It needs information and advice from faculty and students – more than it has so far arranged to take; but this can be arranged, in various ways, including the newly proposed all-university advisory councils. There are members of University committees with just those qualities that could add greatly to the Corporation, but the Corporation should draw the few scholars appropriate to the Corporation from a university other than Yale.

"One or a few Yale students or faculty on the Corporation could not, in any case, establish their credentials as representatives, given the size and diversity of their constituencies. It would always be a matter of doubt that they knew their constituencies any better than they were known by any other members of the Corporation. A more serious objection is that, if there were such members, they should not be encouraged or even allowed to think of themselves as representative of constituencies. They should instead be committed to the University's major purpose, even at the expense of constituencies whenever conflict between purpose and constituency wishes developed. But, then again, if they did not represent constituencies the justification of their membership on the Corporation would have been anchored in their own personal qualities. But if that is so, there is no reason to specify that any members should be, specifically, Yale faculty or Yale students. And, to protect against the degeneration of a Corporate seat into a constituency seat, it would be better to avoid Yale faculty and students entirely, all the more so since they have far superior methods of communicating to the Corporation through existing devices, as well as through the new all-university advisory councils." (pp. 26-27). The Yale Commission was composed of faculty, students, alumni, and employees. Similar committees at Harvard and Princeton published similar opinions at about the same time.